

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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THOMAS J. SCHMALTZ,

Plaintiff-Appellee,

v

MICHIGAN TRACTOR AND MACHINERY,  
CO.

Defendant-Not Participating,

and

GREYSTONE BUILDERS, INC., d/b/a  
GREYSTONE CONSTRUCTION, INC.,

Defendant-Appellant.

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UNPUBLISHED

May 22, 2003

No. 237991

Oakland Circuit Court

LC No. 97-002459-NP

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JAMES A. SMITH,

Plaintiff-Appellee,

v

MICHIGAN TRACTOR AND MACHINERY  
CO.,

Defendant-Not Participating,

and

GREYSTONE BUILDERS, INC., d/b/a  
GREYSTONE CONSTRUCTION, INC.,

Defendant-Appellant.

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No. 237992

Oakland Circuit Court

LC No. 98-008659-NO

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Defendant, Greystone Builders, Inc., d/b/a Greystone Construction, Inc., appeals as of right from judgments entered on jury verdicts rendered in plaintiffs' favor in this consolidated contractor liability action. We affirm.

This case arises as a consequence of injuries sustained by plaintiffs when the manlift in which they were working tipped over while extended thirty to forty feet in the air. Plaintiffs were employed by Troy Metal Concepts, a subcontractor hired by defendant, the general contractor, to perform work on a commercial construction project. Plaintiffs filed actions against defendant alleging that defendant was liable to plaintiffs under the retained control and common work area exceptions to the rule that a general contractor owes no legal duty to an employee of an independent contractor. The trial court denied defendant's motions for summary disposition and directed verdict, and a jury rendered verdicts in favor of plaintiffs. Defendant appeals.

Defendant argues that the trial court erred in denying its motions for summary disposition and directed verdict because plaintiffs failed to establish either that defendant retained control over the work site or that defendant failed to guard against observable and avoidable dangers in a common work area. We disagree. A trial court's decisions on motions for summary disposition and directed verdict are reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

Generally, the employer of an independent contractor is not liable for harm caused to an employee of the independent contractor. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997). Three exceptions to this general rule are: "(1) when the general contractor retains control over the work; (2) where there are readily observable and avoidable dangers in common work areas that create a high degree of risk to a significant number of workers; and (3) where the work is inherently dangerous." See *Ormsby v Capital Welding Inc*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 233563, issued January 24, 2003), slip op, p 3 (citations omitted). In this case, plaintiffs relied on the first two theories of general contractor liability.

First, the retained control doctrine permits the imposition of liability where the general contractor has not truly delegated the work but, instead, retained and exercised control over the manner or environment in which the work was performed. See *Funk v General Motors Corp*, 392 Mich 91, 101-102, 108; 220 NW2d 641 (1974), overruled in part on another ground by *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982); *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 77; 600 NW2d 348 (1999). General oversight or monitoring is insufficient. *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994).

Here, plaintiffs' evidence indicated that defendant was responsible for establishing and enforcing safety policies on the job site, employed a safety director on the site who was responsible for ensuring adherence to state safety regulations, had the right to stop work if safety precautions were ignored, and had the right to exclude workers from the site if they did not follow the safety rules. See *Phillips, supra* at 408-409. More importantly, defendant had control over the environment in which plaintiffs worked, specifically, over the grading and leveling of the worksite on which plaintiffs were required to use the manlift. Defendant's laborers

attempted to flatten the surface before the manlift could be operated along the edge of the building, and ordered another subcontractor to level the area and lay gravel. Therefore, we agree with the trial court that plaintiffs established a question of fact regarding whether defendant retained control over their work environment. See *Ormsby, supra* at 10; *Phillips, supra*.

To establish liability under the second exception, the common work area exception, there must be: “(1) a general contractor with supervisory and coordinating authority over the job site, (2) a common work area shared by the employees of several subcontractors, and (3) a readily observable, avoidable danger in that work area (4) that creates a high risk to a significant number of workers.” *Hughes, supra* at 6, citing *Groncki v Detroit Edison Co*, 453 Mich 644, 662; 557 NW2d 289 (1996). Here, plaintiffs’ evidence established that there was at least genuine issues of fact upon which reasonable minds could differ regarding this theory of liability.

First, the evidence indicated that defendant had supervisory and coordinating authority over the job site and scheduled and coordinated the various trades. Second, the area in which plaintiffs were working was a common work area in that there were other contractors working on a section of the same wall, communication workers were digging a trench less than thirty-five yards from the manlift when it fell, and the daily construction report showed five subcontractors present on the site the day of the accident. In addition, ironworkers, carpenters, and masons all worked on the wall in the same area of the accident during the project. Third, a readily observable and avoidable danger existed in that common work area in that the ground was uneven and muddy and defendant’s supervisor ordered another subcontractor to level the ground and lay gravel. Further, the construction supervisor acknowledged that uneven ground would pose a preventable danger to the subcontractors using equipment in the area and both plaintiffs testified that they had previously complained about the condition of the ground in the area. Finally, the condition of the ground created a high degree of risk to a significant number of workers because many of the subcontractors on the site used manlifts or other equipment that required a firm level surface to work safely and many workers could be harmed if a lift fell. Therefore, plaintiffs established that an issue of fact existed with regard to whether plaintiffs were injured in a common work area; accordingly, defendant’s motions were properly denied. See *Spiek, supra*; *Meagher, supra*.

Defendant also claims that plaintiffs failed to present evidence that the condition of the ground was a cause of plaintiffs’ injuries. See *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001). We disagree. Plaintiffs’ evidence established, at least, a question of fact that the lift would not have tipped if it had been on level ground. In particular, there was evidence that (1) safe use of manlifts was an issue on the jobsite, (2) rough ground is a hazard for machinery because of the danger of tipping, (3) the manlift had leaned in towards the building on a previous occasion because of slipping into a hole in the ground, (4) the area had been graded and gravel put down for the elevator delivery workers and “for everybody on the site,” (5) before the accident plaintiffs’ foreman had asked the assistant construction supervisor to do a better job grading the area because it was interfering with the workers’ ability to do their work, (6) plaintiffs’ foreman saw a hole the size of a bowling ball to the left rear side of the manlift about two feet away from the machine after it tipped, (7) the work site was slippery, and (8) the lift expert testified that the only ways a wheel could be stuck in an “up” position is if it was moved while the floating axle was locked or if the manlift had been driven into a hole, and that the lift

could tip over if the ground on which it was situated gave way. This evidence was sufficient to place the issue of causation before the jury.

Affirmed.

/s/ Jane E. Markey  
/s/ Mark J. Cavanagh  
/s/ Joel P. Hoekstra